

approaches to impasse

Approaches to the Impasse Problem

Wayne Brazil – 2008

I. IMPASSE IN LARGER CONTEXT

Is impasse always bad? No.

Does impasse represent failure? Not necessarily – and if it does reflect a ‘failure,’ that ‘failure’ is not necessarily the neutral’s.

To answer these questions, we need:

(1) to define “impasse” and

(2) to understand clearly what our role is and what our principal duties and objectives are **when we are serving as a neutral in a court sponsored ADR program.**

A. What is “impasse”?

After full exploration of interests, reliable analyses, and after trying with an appropriate level of persistence to address all barriers (whether rooted in the case or not), the parties still have firmly held mutually exclusive views about what terms of settlement would be acceptable, views that are rooted in (1) values, emotions, or beliefs whose roles the parties understand and/or in (2) analyses that are rational.

This definition would acknowledge the possibility that values or forces other than rationality could ‘legitimately’ cause the separation between the parties – as long as those values or forces were understood or acknowledged.

B. As an evaluator or mediator *in a court sponsored program*, **what is our primary role and what are our principal duties?**

It can be important to **distinguish** between working as a neutral in the **private sector** and working as a neutral in a **court program**.

A special set of norms apply to neutrals who work in a court program, especially if the character of the program or other circumstances create a real possibility that parties and/or lawyers will view the neutrals as representatives or agents of the court.

Different sets of values or ideas (perhaps fixed differently by different clients or organizations) might drive or dominate how a mediator or an evaluator who is working in a purely private setting determines what his or her highest objectives are – and what precepts should govern how he or she plays the role of mediator or evaluator.

1. A **court evaluator's** principal role: **not** settlement, but offering assessment or substantive feedback that is as honest, reliable, and useful as possible, thus helping with analysis of the merits, sharpening joinder of issues, and positioning the parties to engage more efficiently in the case development process.

2. A **court mediator's** principal duty: **not** to get a settlement, but to host a process with visible integrity, a process that inspires the respect and confidence of all the participants.

Knowing that I had hosted a settlement conference in a case assigned to him, a judge recently asked me: “did you settle my case yet?”

What is wrong with this question?

C. Given our role and responsibilities in a court sponsored program,
how should we “frame” our goal or objective with respect to impasse?

It is NOT our job or responsibility to “break” impasse [we shouldn’t be trying to “break” anything] – and mis-assuming that it is our job to “break” impasse can tempt us to use inappropriate techniques.(to try to pressure or manipulate parties into movement).

We need to remind ourselves that we may contribute a great deal toward the ultimate settlement of the case, and/or to other important benefits or value the parties get out of the mediation/evaluation process, even when the parties fail to achieve a settlement in the process we host.

Many times, our mediation or ENE session will jump start or form the foundation for a settlement process that the parties complete on their own after our work with them.

We also need to recognize that it is very common for parties not to reach agreement in the first mediation session – even if it is a long, labor-intensive affair – but that we will be able to help them achieve a settlement with appropriate follow-up after the first major session.

Such follow-up can range from brief phone conversations or emails through second and third full-scale mediations.

We also should acknowledge that some parties (especially repeat institutional players in commercial cases) may self-consciously conceive of a mediation session or process not as the occasion to reach a settlement, but as a tool to demonstrate strength and resolve to an opponent [to ‘soften up’ the other side], to probe for possible terms, and to set the stage for negotiations that will occur sometime after the mediation has been completed.

So, when we are serving in a court program, how should we frame our task/responsibility with respect to apparent impasse?

It is to help the parties

explore and understand the sources and character of their impasse **and** to

help them determine whether their apparent impasse is real and not reversible.

What is the most important determinant of your ability to perform this service:

how much the parties trust and respect you;
how genuine both you and your interest in helping them are.

Secrets of Successful (and Unsuccessful) Mediators

by Stephen Goldberg & Margaret Shaw

Studies Two & Three published in the
October 2007 issue of the Negotiation Journal

Study Two: survey of lawyers (mostly) and others who had participated in mediations hosted by a select group of highly regarded mediators.

Attributes cited most frequently as most important to mediators' effectiveness

Generalization: Respondents viewed “confidence building attributes” as appreciably more important to mediator effectiveness than either “process skills” or “evaluative skills.”

“Confidence-building attributes”:

Friendly, empathetic, likable, relates to all, respectful,
conveys sense of caring, wants to find solutions 60%

High integrity, honest, neutral, trustworthy,
respects/guards confidences,
nonjudgmental, credible, professional 53%

Smart, quick-study, educates self on dispute,
well-prepared, knows contract/law 47%

“Process skills”

Patient, persistent, never quits 35%
[all others cited less often; most by a considerable margin]

“Evaluative skills”

Does useful reality testing regarding
legal/contractual weaknesses,
evaluates likely outcome in court/arbitration,
candid regarding same 33%

Study Three: survey of same people who responded in Study Two, but this time they were asked two different questions:

(1) if they had ever participated in a mediation in which they felt that the mediator had engaged in **counter-productive conduct** that **reduced the likelihood of settlement** and, if so, to identify any such conduct; and

(2) if they had ever participated in a mediation in which they felt that the **mediator was so unsatisfactory** that they would never use that mediator again, and, if so, to identify the personal qualities or behaviors on which that feeling was based.

Results: (very low response rate; data based on input from only 96 respondents – a subset of those who responded in Study Two)

By a considerable margin, the attributes cited most often as the reason a mediator's work was **unsatisfactory and ineffective** were

“Lack of confidence-building attributes” [or, ‘attributes that undermine confidence’]

Lack of integrity, not neutral,
disclosed confidential information,
failed to accurately convey position,
inconsistent evaluations,
interested in settlement at all costs,
too quick to reach conclusions 48%

Among the other attributes identified frequently as reasons for a mediator's ineffectiveness were

lacking energy or firmness,
just going through the motions,
just delivering messages 24%

self-absorption, not listening, and
not being respectful or empathetic 20%

II
“MANAGING” THE ADR PROCESS
AND
HANDLING YOUR ROLE
TO
REDUCE THE RISK OF PREMATURE IMPASSE

One of our tasks is to try to “manage” the ADR process so that impasse does not occur – or at least so that if impasse surfaces, it does so only at the end of a long, careful process.

The focus of this section: Tools or techniques to reduce the risk of premature or false impasse

Remember: it is very common for mediators to encounter “apparent” or “false” impasse;

Some variety of the impasse animal is likely to surface in a substantial percentage of mediations.

So we must not be surprised or thrown off-balance when this happens.

Rather, we need, as an initial instinct, to recognize at least the first apparent “impasse” as nothing more than a natural part of the process – and then to continue our process in an appropriate, constructive way.

Integrating themes: Transparency and Inclusiveness.

Two sets of assumptions underlie and inform much of my thinking in these arenas:

1. I believe that

(a) by being transparent about ourselves and the processes we host,
and

(b) by inviting the parties and lawyers to participate in making process decisions:

→ we communicate respect for the parties, that

→ respect is one of the most liberating and energizing forces in human interaction, and that

→ demonstrating respect in this way encourages parties to embrace the spirit of mediation.

2. There is **one variety of transparency** that may be under-utilized but that I believe can have especially positive effects:

the shorthand title I use for this variety of transparency is

“name it and explain it.”

(a) Here is what I mean by **“name it and explain it”**:

When you are worried or concerned about something before or during a mediation that could compromise the potential of the process,

(1) articulate directly to the parties what that concern is –
“name it” –

(2) then explain how that behavior or attitude or circumstance could impair the parties’ ability to maximize what the mediation could do for them.

(b) The “name it and explain it” process can

(1) *help the parties become more self aware, and*

(2) *help them understand better the effect on the process that a position or approach is having, and*

(3) *pull the parties into the process of finding ways to overcome a problem*

→ **converting them from source of problem to source of solution** and, in the process,

→ **energizing their participation** in the mediation.

Some Tools for reducing the risk of premature or false impasse:

I. Counseling the participants

A key to helping participants avoid premature or unnecessary impasse is to *counsel them* at the beginning of and throughout the session about mistakes you have seen others make and about approaches or steps or moves that are most likely to improve prospects for productive negotiations.

A. Counsel parties (in joint session or in caucus) about real listening and constructive communication.

One way to counsel the participants indirectly is to explain the part of your role that revolves around **reducing the risk of false failure**.

Some of the reasons for false failure:

1. social error – insensitive or pugnacious remarks
2. analytical error
3. miss-guessing what terms might be accessible
4. shortfall in tenacity
5. process error, e.g., painting oneself into a face corner
6. participants permitting “competitiveness” to displace judgment. Sometimes lawyers or clients convert the settlement dynamic into a competition instead of a search for what is best for the clients.

B. Counsel parties about the viscera or dynamics of negotiations generally; e.g., each person’s need to achieve something, the parties’ need to preserve options, to justify movement, to save face, etc.

Try to manage the process so that one party does not make substantially larger concessions at any given point than the other party.

Try to preserve a sense (in all the parties) of roughly equal reciprocity of movement/concessions.

C. Before negotiations become too emotionally dense, consider meeting privately with one lawyer at a time, e.g., to identify areas of special client sensitivity or subterranean problems or agendas.

D. As the process develops, help the parties assess their informational situation, i.e., help them determine what they need to know, inside and outside the litigation, in order to make responsible negotiation decisions.

Help parties determine whether there are informational gaps that would make it unwise to make an offer or demand at this time, or to take a rigid settlement position?

E. Counsel parties not to rush to the numbers.

F. Counsel parties about considerations that should inform the making of the **first (opening) offer or demand**. Substantive factors and timing.

➤ Make sure parties identify all the elements or components of a settlement demand that really are important to them the first time they make an offer or demand – to avoid a last minute effort to add an important condition or element that could cause resentment and impasse.

Remind parties about **factors** they might want to consider when deciding what their **opening** offer/demand should be:

1. Do not open with a number that is outside the range of plausibility.
 - a. Reduces the credibility you need during the negotiations – especially when your client really has bottomed out.
 - b. Makes you seem foolish, unwise, greedy, and/or inexperienced.
 - c. Gives your opponent no incentive to negotiate – or to respect you or to take you seriously – can even cause so much anger that it kills the negotiations at the start.
 - d. Might encourage false hopes in your client.

2. Select a number that is within the range that you can explain on the basis of the evidence and law;

root your number in reasoning about the merits –

unless some external factor, that you identify, must control your client's settlement position.

Never underestimate the power of fairness.

3. Do not open with your client's real bottom line.
 - a. Sucks the viscera out of the process.
 - b. Likely to be seen by opponent as you throwing down a gauntlet – as you making a challenge that requires a comparably aggressive counter-attack.
 - c. Leaves no room for other party/lawyer to achieve something through the negotiations.
 - d. Leaves you with nothing to trade to help your opponent justify movement he might want to make, or might be willing to make.
 - e. Suggests that you have nothing to learn – and leaves you no room to move if you learn something significant.
4. Do not open with a number your opponent already has emphatically rejected (at least unless you acknowledge that rejection).
5. Consider what the likelihood is that your opening number might “anchor” the negotiations in a favorable zone.
6. How informationally mature is the case?

Less mature = more distance ok between opening number and place you are likely to end up.
7. How protracted are the negotiations likely to be?

8. How do opposing counsel and client go about negotiating?

- straight-forward? impatient with gaming?
- gamer?
- distrustful, paranoid, fearful?

9. In what range is your opponent's opening figure likely to fall?

Approximate parity of movement (en route to final figure) tends to feel fair, lubricate the process.

But don't permit your figure to appear to be entirely reactive – keep it rooted in the case or in identified situation-specific circumstances.

10. How great is your opponent's need to “win” – or to feel that she has achieved something significant through the negotiations?

11. What are your strengths and weaknesses as a negotiator?

If not vulnerable to pressure, need less room.

12. What is your reputation as a negotiator? or What do you want your reputation as a negotiator to be?

If you have a widely-known reputation as a negotiator, it can be risky and misleading to your opponent to deviate from behavior that your opponent expects.

13. What level of experience/expertise does your opponent have with this kind of case and with the settlement value of and the settlement dynamics in this kind of case?

14. What level of experience/expertise in this kind of case does your neutral (judge, mediator) have?

15. With what degree of certainty can the damages be measured?

16. Do not pick a number that is right on an emotionally or symbolically significant plateau. 99 is different from 100.

G. Counsel parties about issues related to or fears of “bidding against myself”

Consider using secret offers/demands to overcome this source of resistance.

Reassure a reluctant party that you would not be exploring the possibility that she would make a move if you did not think that her opponent was likely to be open to making a move.

H. Counsel parties about “slippery slope” issues in negotiations

Reassure parties that they have the independence to avoid slippery slopes and that their lawyers are fully competent to protect them from making an unwise decision that is supported only by momentum.

Also reassure the parties that you will not pressure them to make any moves or changes of position.

I. *Remind parties that a key to settlement is to make an offer or demand that makes it difficult for the other side to walk away.*

A party who wants to reach a settlement cannot make proposals that the other side can dismiss without feeling that they might be making a mistake, without worrying that if they reject your proposal they (or people to whom they report) might later regret the decision (because it might turn out that they would have been better off if they had accepted your proposal).

II. Handling Your Own Conduct [as the neutral] to reduce risk of premature or false failure (impasse).

A. Articulate your views of the merits in ways that do as little damage as possible to the parties' sensibilities and to your ability to help the parties in settlement negotiations.

Preserve their trust and their confidence in your impartiality.

Preserve their respect by being respectful (visibly).

Remind the parties, **by the way you form and express your views**, how analytically fragile litigation can be – how difficult predicting outcomes is, how many variables can come into play in at least partially unforeseen ways.

B. Never state or imply your views about the merits (even some part of the merits) early in the process.

Wait until you have learned everything you can – including what everyone else's views of the merits are.

Some evaluators prepare parts of an evaluation before the session; if you do so, **limit your outline to identifying issues and** setting forth **legal principles** and citations; fill in the substance after the session.

C. Be careful about how you ask or frame questions. Remember:

the form of a question can imply a substantive view, or

appear to be implicitly accusatory, or

feel like cross-examination animated by alignment with the opposing party [frame Qs in true spirit of direct exam].

1. It's almost always best to ask questions in the open-ended, non-leading form.

2. Try to preface questions by saying, explicitly, that you are asking in order to improve your understanding or to gather information that the parties already have.

Make sure you imply that the cause of the confusion is your own

ignorance, or your own failure to keep up, etc.;

do not imply that the source of your confusion is incompetent or deceitful communication by the person to whom you pose the question (or someone allied with that person).

In other words, blame yourself for the confusion, uncertainty, or ignorance. Don't blame the speaker.

“Please, help me catch up with you.”

Be respectful of (even complementary towards) the lawyers – not condescending or judgmental.

3. Don't ask questions that seem analytically (or emotionally or morally) aggressive or abrupt.

Don't be competitive with the lawyers (or anyone else) – e.g., don't “compete” for center stage, or ‘control,’ or for analytical or experiential superiority.

4. Don't ask questions to show off what you know or how smart you are or how well you understand the case.

D. Even as an “evaluator,” don't be afraid to say “I don't know.”

1. Don't feel that it is your “duty” always to have an opinion; sometimes there just isn't a sufficient basis for an opinion.

You may feel pressure to have an opinion or to know something because you are supposed to be an “expert” and you are supposed to be experienced and wise.

But don't permit any party or lawyer to pressure or bully you into forming or expressing an opinion if you really don't have one, or if you are very unsure about the bases for it.

It can **enhance your credibility** to admit in a straightforward way that

you don't know something or aren't at all sure about something.

2. If you have an opinion that you cannot explain or justify (by reasoning), you should say something like:

I don't really have an opinion about that – or

I don't have any opinion that I could support about that, or

I have only an “infirm instinct” about that – nothing that anyone should put any real stock in.

In this situation, it might be wise to try to figure out why you can't explain the opinion – or at least try to identify what is informing your “infirm instinct” (you might discover that what is informing your instinct is only bias of some kind – or an assumption you are transporting from some quite different setting).

D. Appropriately qualify and limit your assessments of the merits –

as a matter of honesty and

to preserve (if appropriate) room to make adjustments in your views, or to help the parties justify making changes in their positions.

Be sure to **identify very clearly what you are assessing** or what you are expressing an opinion about.

Do not assume that clients will understand what piece or component of the case you are assessing – or even that you are offering an assessment.

1. Indicate views of the merits only of the matters for which there seems to be a substantially sufficient basis for a reasoned opinion;

You might decline to indicate a view on the merits of any part of the case, or you might limit the matters on which you indicate a view (properly qualified) to

some portion of the case, or

some particular claim or defense, or

some element of a claim or defense, or

some contested fact, or

a disagreement about some point of law.

2. Never over-state your conviction about your opinion and never purport to be 'positive' or '100% sure' about your opinion on a contested issue.

Do not use phrases like "findings of fact" or "conclusions of law." Do not purport to making "findings" about anything.

Do not say or write things like "the evidence clearly establishes that" or "on the evidence, the facts are".

One instructive experience: recently, in an employment disability case, an experienced and conscientious evaluator wrote a thorough evaluation that assessed the merits in favor of the defendant; then the case went to a settlement conference hosted by a magistrate judge, to whom the evaluator's evaluation was disclosed, but no settlement was reached; so the case went to trial, where the jury returned a verdict in favor of plaintiff for 1.7 million dollars (the bulk of which was for pain and suffering – emotional distress damages).

3. If you would need additional information to assess some aspect of the case, identify that information specifically.

And explain why you feel you need the particular additional information – what role it would play in your analysis/assessment.

➤ This might be something as modest as watching a part of a video-taped

deposition.

➤ Or, it might be something as significant as a ruling by the judge on a motion for summary judgment.

4. If the content of your opinion about something is contingent on something else, identify what that contingency or condition is.

For example, you might say:

➤ “If the jury were to resolve factual dispute X in a specific direction, then I think ‘Y’ would likely [or more likely] follow. [then explain why]

OR

➤ “If independent witness X were to testify along the following lines, then I think ‘Y’ would more likely follow.” [then explain why]

5. If you offer an opinion about the whole case, and if your opinion includes a monetary value, make sure you distinguish between

(1) **judgment value** and

(2) **settlement value**.

Of these two, what is contemplated in the ENE process is a “judgment value.”

If what you articulate is a “judgment value” (explicitly so identified), you will leave yourself room, as a settlement facilitator, to express a different view about what the settlement value of the case might be.

6. When you express an opinion:

Remind the participants that you are not passing judgment on anyone;

Instead, you are simply trying to help the parties predict what kinds of inferences of fact a jury or judge is likely to draw from the evidence and how the trier of fact might apply the relevant legal principles to those findings of fact.

Emphasize tangible evidence and

what inferences jurors might draw (based on their common sense and general experience) from

the structure of the situation and from

their sense of the usual operation of incentives.

III. WHAT TO DO IF THE PARTIES SEEM TO BE AT AN IMPASSE

First, BEWARE OF CONCLUDING TOO QUICKLY THAT APPARENT IMPASSE IS REAL.

Don't simply take at face value a party's statement that it's "best" or "final" offer is "X."

Begin by trying to identify the source (or sources) of the impasse.

A. Different sources of impasse are likely to call for different techniques or approaches.

B. Involve the parties directly and openly in the process of identifying the sources of the impasse.

Encourage ownership of and buy-in to the process:

Openly asking the parties to lead the effort to identify the source of the problem and to decide what process steps to take to address the problem
communicates and demonstrates to the parties that this is their process, not the court's or the neutrals –
that it is their interest in making it work that is at stake, not the court's.

So, especially if the source of the impasse is not obvious, or

if you have any reason to suspect that there might be some additional but as yet unidentified factors or emotions at play,

ask each party (perhaps in private caucus) why the process is stuck and for ideas about how to get it on track.

C. If the parties and lawyers have not been able to identify the sources of their impasse, and if you think you know what the source of the apparent impasse is, *consider naming it and explaining it* – gently – as part of a transparency of approach that can encourage trust.

But don't just announce that you "know" what the "problem" is; instead, say something like:

"I've seen parties in this kind of situation in other cases, and it turned out that what was getting in the way of further progress was [. . . X . . .]. Do you think that factor is at play at all here?"

D. Possible sources of impasse:

- Is the source informational?

- Is the source analytical?

Is the source a significant difference between the parties in apparently sincerely held views about what the relevant law is, or about what the evidence will be or how it will be interpreted?

➤ **Is a source of the difference between the views or positions of the parties something that the evaluator or mediator has articulated or intimated?**

Or how or when the neutral's views were delivered?

- Is the source excessive posturing (e.g., trying to intimidate or trick an opponent into accepting unfavorable terms), or gambling, or some lawyer or client in some other way trying to game the process?

- Is the source of impasse emotional or interpersonal?

Lawyers or clients who don't like one another?

The egos or the competitiveness of lawyers or parties or both?

A lawyer and her client who don't like one another?

If the source is emotional, what is its form: anger, shame, fear, jealousy, revenge, etc.?

Targeted on whom or what?

Need to rebuild sense of self?

Do participants need time to cool off, or to let proposals percolate, or to 'process' what has happened at the mediation, or to get some perspective on and to acknowledge and accept (emotionally) what their alternative paths really consist of?

- Is the source some factor or situation that is external to the litigation?

(1) External business relationships or situations?

(2) Shelf life of a product?

(3) Time-value of money?

(4) Tax consequences?

(5) Somebody needing to protect their job or their record or their self-esteem?

(6) Implications of settling this case for other pending or feared cases (ripple effects to other litigation)?

Generalized fear of unpredictable consequences? or

Fear of effects of specific proposed terms of settlement, or

Fear of the consequences of the fact that the party agreed to settle?

(7) Some political pressure or consideration?

(8) Fear of public disclosure (embarrassment, etc.?) or criticism of terms or fact of settlement?

- Is the source of impasse fear by some participant in the process that someone who is not present (boss, partner, board, etc.) will second-guess and criticize the terms he or she accepted or recommended? Or will be unhappy that any settlement was reached (e.g., before the 'budget' the firm targeted for the case had been spent/earned?).

- Is the source the influence or views of some person or group who/that is not present, not participating directly in the negotiations or even the litigation?

- Is 'distrust' the source of impasse? Of whom? (maybe you)

What is the source of the distrust?

Is the source fear of being tricked or cheated or taken advantage of?

- Is the source simply fear of leaving something on the table, or fear that the other side will get the better of the deal, or a competitive person's fear of being "bested" in the negotiations?

- Is the source a greedy or over-reaching lawyer?

- Is the source advice by a lawyer that is clearly defective?

- Is the source lack of confidence by or in a lawyer?

Inexperience? with this kind of case?

Insufficient homework/understanding?

Fear of malpractice/losing client?

- Is the source greedy or over-reaching by a client?
- Is the source clearly unreasonable and unrealistic expectations by a client?
- Is the source lack of confidence, uncertainty, by the client –

Lack of confidence in her own lawyer?

Lack of confidence in her own judgment – or her power to decide?

- Is the source of impasse a party's fear that he will feel diminished by a settlement, a fear that a compromise would feel like or be seen by others as

a failure (to attain or preserve everything), or

an abandonment of principles, or

a partial or oblique admission of fault?

We can help by giving the party information about other cases – e.g., if the terms being offered by the defendant support us saying so, we can reassure the plaintiff that defendants only offer these kinds of terms in cases they take very seriously – and that, within the legal world, no one would view a settlement on these terms as a failure or as reflecting any lack of conviction, commitment, or courage by a plaintiff.

- Is the source fatigue?

Are the parties too exhausted to think clearly and from a perspective that is consistent with their underlying interests?

Are they reluctant to move because they are aware that they are exhausted and are afraid that, in that state, they will make bad decisions, decisions they will regret later?

Has the process been focused for a sustained period on one kind of issue or problem or one kind of approach; do parties need a change of focus, or a distraction, or an emotional or analytical break?

D. SOME PROCESS TOOLS FOR ADDRESSING IMPASSE

Remember to try to pick tools that are tailored to the specific source of the impasse.

1. Ask parties in private caucus what they believe the source of the impasse is. Why are we stuck??

Consider asking each side (in private caucus) to analyze the line of reasoning that supports its own settlement position and the settlement position of the other party [this kind of request can seem precious to some lawyers and repeat players; be prepared for resistance to this idea, especially if the mediation already has consumed a substantial amount of time].

Or, ask each party to try to identify the issue or circumstance or consideration that seems to be playing the biggest role in separating the parties.

Or, consider saying: Our process doesn't seem to be working very well; do you have any ideas about how we could get it back on track?

Or, is there anything you might be able to do that might get us rolling again?

2. **Should we try some other format or approach?**

Meet separately with counsel? With the parties? With one party or lawyer at a time? A group session, e.g., so parties can brain storm together, or make sure that each understands all the considerations affecting the other's approach to settlement?

3. Consider turning the negotiations over to the parties, directly, pulling the lawyers and maybe even the neutral out of the dynamic.

4. Should we involve some additional or new people in the process?

A boss? The senior partner? The CEO/CFO? Spouse? Friend? Partner?
Carrier? Surety?

A lawyer or a substantive expert with a different background or perspective?

5. **If** the source of impasse is **informational or analytical**, **make a plan** to enable the parties to acquire the information they need.

For example:

- a. take a key deposition or file a key motion,
- b. acquire key documents (e.g., medical records), or
- c. bring in a mutually acceptable neutral expert (could be an expert in a substantive discipline, an industry, or even a lawyer with deep experience in the relevant field) – to get a credible second opinion on a key issue or to conduct an investigation or tests and report findings.

Then schedule appropriate follow-up.

6. Could you give me [the mediator] some additional information or new arguments (case related or not) that I might use to help the other party rationalize or justify movement?

7. If the source of the impasse seems to be emotional or interpersonal:

- a. Consider creating a safe (private caucus?) setting for the parties to give voice to their feelings – to try to vent and clear a path to move forward.
- b. If appropriate, consider trying to persuade the litigants (and/or lawyers) to separate the process of searching for a solution to the problem from their negative feelings about the people.

Victoria Pinchon, a mediator in Southern California with Judicate West, invented the following approach to this situation in case involving mud-slide damage between neighboring property owners.

The principals disliked one another intensely and their emotions had interfered with their capacity to focus on other relevant things, including

solution options.

Ms. Pinchon put a cup in the center of the table and told everyone that the cup represented the problem.

Then she gave each participant in the mediation a penny.

She suggested that if each participant put his/her penny in the cup, that would help them focus on the problem and not be distracted by emotions.

When they wanted to know why they should put their pennies in the cup, Ms. Pinchon told the participants:

“Whenever your focus shifts back to feelings, I’ll jiggle the cup a little. I’m not suggesting you shouldn’t say how you feel . . . I’m just proposing that it would help all of us if we were aware of the moments when we’re acting in response to emotion and when we’re thinking about a business solution to an economic problem.”

Somewhat reluctantly at first, each of the participants agreed to put his or her penny in the cup.

That act by itself – so reminiscent of grade school – broke a little of the interpersonal ice.

And setting up and explaining this little system served as a way to gently teach the participants what their emotions were doing to the process.

Setting up and explaining this system also distracted them for a few minutes from those emotions.

The system worked – as the participants were thereafter able to maintain a business perspective and to settle their case.

See Victoria Pinchon, “When Talks Reach an Impasse, Mediators Work Their Magic,” in the San Francisco Daily Journal, April 30, 2008, p. 6.

8. Are there any invisible issues in the litigation or in the dynamic between parties or counsel?

9. Is there an invisible agenda at work in this case?

10. **Offer** (in your role as a neutral) to **help** in situation-specific ways, e.g. to:

- a. Help **draft** a critical paragraph (or to **resolve drafting disputes** if counsel reach a drafting impasse).
- b. **Speak to persons whose support or approval is needed** (a meeting of a union or a board of directors).
- c. **Conduct a mediation somewhere more convenient** for the parties – or more accessible to their constituents.
- d. **Visit the site of a critical event or review important evidence.**
- e. **Attend a sensitive deposition.**
- f. **Approach a non-party** to seek its participation or cooperation, e.g., to provide information, to settle or remove a lien, to acknowledge insurance coverage, to grant a license or join a venture, etc.

Insurance carrier.

Hospital (or other health care provider).

Supplier.

11. How has being involved in this conflict/litigation affected you and your situation? The other parties and their situations?

What price (monetary and non-monetary) have you had to pay for being involved in this litigation? Have the other parties had to pay?

12. What would change (or what would be different for you or for other parties) if you reached an agreement?

13. Ask each party in private caucus: If the parties fail to reach an agreement, what is

your vision of how this matter will play out?

Tell me as specifically as you can what are the procedures are that will be followed and the actions that will be taken from here through the end of the litigation (including appeal)?

How long will these take and how much will they cost (you; other parties)?

What is your “**likely alternative to a negotiated agreement**”?

[otherwise known as your “**LATNA**”]

Be sure to explain that you are not asking these questions in order to put pressure on anyone – but because your job, as the neutral, is to help each party understand what each alternative course is likely to entail.

14. What will your situation be (broadly defined) if you lose at trial (and on appeal)?

15. Suggest non-monetary elements of settlement packages – including ‘apologies’, joint press releases, assistance finding a new job, joint ventures, consideration in kind, etc.

16. Identify things [outside the lawsuit] that the plaintiff might value that the defendant is in a position to deliver but that plaintiff could not acquire or accomplish on his own, or that defendant could deliver with less difficulty or at less cost.

17. Do the parties need to restructure deals/relationships for tax purposes? Consider structured pay-outs?

18. In multi-party cases, try to get a deal between any two of the parties – to create momentum and/or concern among the other parties that they might be left alone on their side of the case.

Find the most reasonable defendant or the most respected defense lawyer – and try to get a deal with that party.

19. Separate inventing from deciding: ask parties to invent or imagine as many different

settlements of the dispute as possible, reassuring them that they are committing themselves to nothing in this process.

Or, in a variation on this theme, ask each party to identify 2 or 3 different possible settlement packages, again without commitment.

20. Hypotheticals:

Based on how the case might play out:

→ If the evidence were to be viewed as

→ If the judge were to rule in “X” way on a motion (e.g., for partial summary judgment, or a motion in limine, etc.)

Based on what an opponent might do in the bargaining process:

→ If the other side were to offer X or do Y, would you be willing to

→ Would you be willing to move by X if the other side also were willing to move by X?¹

→ If the other side would agree, would you be willing to agree to have the rest of our bargaining fall within the range of X to Y (e.g., \$100,000 to \$200,000)?

→ If you knew that you would never have to pay a dime more to your opponent in connection with this matter, would you be willing to offer “X”?

*If you ‘make up’ a hypothetical offer to probe whether there are any circumstances in which one party might move, make it very clear to the party to whom you are speaking that the opposing party is not the source of this offer and has not intimated that it might be willing to make it.

*And be very careful not to use in such a hypothetical offer terms that the other party is very unlikely to accept.

¹Dwight Golann of Suffolk University is the source of the phraseology used here and in the next example question. See his forthcoming book and his article in Dispute Resolution Magazine (Spring 2009?).

21. In California state courts, ask each party to make their **best Rule 998 offers/demand**. In federal courts, ask defendant to make best Rule 68 offer.

Randall Kiser's research suggests that parties who go through the process of developing a 998 offer are less likely to make a settlement decision-error than parties who do not make such offers. [settlement decision error = turn down a settlement proposal then fail to do better at trial]

See Randall Kiser, et al., "Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations," Cornell University's Journal of Empirical Legal Studies (September 2008).

22. Share with the parties other key findings of Randall Kiser's research into failed settlement negotiations:

The *incidence of settlement decision-error* is appreciably higher for plaintiffs than for defendants (i.e., plaintiffs are more likely to make a settlement-decision error than defendants);

About 60% of the time plaintiffs fail to get a larger verdict at trial than the final settlement offer from defendant;

whereas **defendants** make settlement decision-errors only about **25% of the time**.

But: the *magnitude* of the decision error is much greater for defendants than for plaintiffs;

The mean difference between last settlement offer and verdict was about \$43,000 for plaintiffs,

but that mean figure was about **\$1.14 million for defendants**.

23. **Secret numbers:** known only to neutral.

Might use hypothetical bracketing to advance this technique; e.g., tell each party that you are trying to help them determine whether they can get to a point where they are only \$100,000 apart – and ask each to make a secret offer/demand that has the best chance of getting the parties within \$100,000 of one another.

24. The *secret conditional [or hypothetical] offer or demand*:

“Would you agree, in confidence with me, to offer ‘X’ but only on the condition that the other side agrees to X or some other condition in advance? I will keep your willingness to settle at X a secret unless and until I get the commitment from the other side to the condition you have specified.”

“In strict confidence, would you tell me whether, if you knew that it would close the deal [if you had a firm commitment that it would close the deal], you might be willing to [pay or accept ‘X’]”

25. **Secret final best offers/demands.**

26. L.A.: defendant writes check to plaintiff and puts it on the table.

27. L.A.: defendant brings cash to the negotiations and puts it on the table, telling the plaintiff that he can have the money right now if the parties settle the case.

28. **Consider offering contained evaluative input or a different perspective:**

If, after the process has played out for quite a while, there is some aspect of the case or situation that you feel a party and lawyer (or the parties and lawyers on both sides) have not addressed adequately or accurately, and you feel that you have some reliable input or a potentially useful perspective on the matter,

you might tell a party and lawyer in private caucus (or all participants in a group session) that there is one aspect of the case or the parties’ circumstances about which you have been thinking and

ask if they would be interested in getting some input from you, or an opinion from you, about that matter.

The parties/lawyers might well first ask you to identify the aspect of the case or circumstances that you have in mind.

If the parties/lawyers want to hear your input or opinion:

- explain that you are offering this input to try to leverage anyone to change his or her position or to try to capitalize on risk aversion, but, instead, in order to try to be helpful by providing a new perspective or a second opinion that the parties can take into account to whatever extent (including none) they choose;
- make sure you qualify appropriately any evaluative input you offer (e.g., identify its limitations or any assumptions on which it is based);
- don't articulate any input you offer as any kind of personal or final judgment.

29. Mediator's number/proposal.

This procedure can provide parties a way to save face, even if getting the deal requires them to move past their "bottom line" – because they can say that the number was the mediator's idea, not their own.

What the mediator says her number/proposal represents can be a sensitive matter, especially for mediators serving in a court program.

The ethically safest course probably is to cast our number as rooted in sociology, not in judgment about the merits of the case: we can explain that, based on all of our experience and what we know about this particular case, our number represents our best estimate of the number that is most likely to yield a settlement – i.e., the number to which odds are best that both parties will agree.

It is **NOT** at all clear that it would be appropriate for a mediator who is serving as a representative of a court to say or suggest that her number represents her judgment about **what the settlement "ought" to be**, or the settlement that would be the **"fairest."**

On the other hand, if asked, it **probably is O.K.** for a mediator in a court program to indicate whether a number (or other terms) that a party is considering **feels 'fair'** – or feels like **'a fair basis'** for disposition by agreement.

It would **NOT** be appropriate for a mediator serving under court

sponsorship to **“beg” or “plead”** for movement or for acceptance of a proposal.

And it would be improper to suggest that a party should change his settlement figure in order **to please the court**, or as **a favor** to the court, or as a special **concession of any kind to the mediator**, who, by hypothesis here, is serving as a representative of the court.

30. Advise parties to consider thinking in terms of **the sociology of the subculture in which they are working, the sociology of what is possible**;

– perhaps using **comparator cases** to suggest that, in roughly parallel situations, cases just don’t settle outside of ‘range X.’

31. Identify external norms (e.g., voluntarily adopted industry standards) or facts that might influence the parties’ feelings/thoughts about what terms would be fair.

One variation on this theme is to describe the purposes of a statute or rule that is in play – and the kinds of problems or harms that it is designed to avoid or reduce – to help a party understand why the law proscribes certain kinds of acts or courses of conduct or decisions, events, even when they are not accompanied by any bad intent or negligence.

Never forget the power of fairness.

32. **Take a break, let parties vent or percolate in private, perhaps go home for the day; but don’t give up.**

Instead, work with the parties to agree on some kind of follow-up.

Examples:

a. Specifically scheduled emails or phone calls from counsel to you.

Reporting any new thoughts, results of further inquiries or consideration, new evidence or legal research, etc. Scheduled, not maybe.

b. Phone calls by you to counsel.

c. Exchanges of additional information between the parties, or scheduling some

pretrial event or discovery process (perhaps we attend or help manage);

d. A follow-up “*time-block mediation session*” by phone or email;²

Ask the parties to set aside a fixed period (e.g., 9:00 a.m. until noon on a date certain) during which you will further explore settlement with them – perhaps in a group phone conference, perhaps in a series of private phone conversations or email exchanges.

The fixed period, with all participants available, can

create a crucible effect and

increase the odds that we will have timely access to the information and the decision-makers that we need.

33. Set a deadline.

Should you tell the parties that this will be your final effort to help them?

34. Last Best Offer Arbitration: get last, best offer from each side – then go to “Last Best Offer Arbitration” – where the arbitrator must pick either the last offer or the last demand (no other options).

35. **Bifurcate**: settle some parts of the case and let the parties either litigate or arbitrate others (or address the remaining parts in some other form of ADR).

This approach might be especially attractive in fee-shifting cases (settle the damages; litigate [by motion] the attorneys’ fees).

In some cases the parties might ask the mediator to take on the role of “czar” (final power; no appeal) for certain purposes or to resolve certain issues.

²Dwight Golann is also the source of this idea. See cites at footnote 1, supra.